Supreme Court, U.S.
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No. 98-1860

IN THE
SUPREME COURT OF THE UNITED STATES

MAURICE BIANCHI fdba
M. BIANCHI OF CALIFORNIA,
Petitioner,

v.

DAVID M. WALKER, Comptroller General of the United States of America, THE UNITED STATES GENERAL ACCOUNTING OFFICE and BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY

The United States, in its opposing Brief in number 98-1860, re-writes the holding of the United States Court of Appeals for the Ninth Circuit in *Bianchi v. Walker*, 163 F.3d 564 (1998). This is evident from the following:

The court's holding, 163 F.3d at 569:	The Government's revision, Brief in Opp., p. 5:
"Because Bianchi seeks damages totaling more than $10,000 based on the settlement agreement, the complaint for a writ of mandamus should have been filed in the Court of Federal Claims." (Emphasis added).	"The Court of Appeals correctly held that Petitioner's claim was contractual in nature and was therefore required to be brought in the Court of Federal Claims. That holding does not conflict with any decision of this court or with any other court of appeals." (Emphasis added).

Moreover, in its Statement, the Government has omitted a material fact, that is, that the Bank fully litigated its rights to monies pursuant to the assignments at issue, received a judgment for the full amount it was entitled to receive pursuant to those assignments and, as a matter of law, the assignments were extinguished prior to the District Court granting summary judgment upon those assignments.

App. L, *infra*, 173a, is the Opinion and Order of the United States Court of Federal Claims in which the Court determined that it was the Bank's burden to prove the amounts

to which it was entitled pursuant to the assignment. App. M, *infra*, 179a, is the Judgment rendered by the United States Court of Federal Claims in favor of Bank of America upon its assignment claims. App. N, *infra*, 181a, is an Unopposed Motion of Bank of America for Reconsideration seeking to correct the amount of the Judgment to increase it to reflect the amount of the interest due upon the principal sums claimed upon the assignment. App. O, *infra*, 186a, is an Order granting the Bank's Unopposed Motion. App. P, *infra*, 186a, is the Judgment rendered upon the Unopposed Motion.

It is clear, and the Government is well aware, that the Bank's receipt of the Judgment fully satisfied the assignments and, thus, extinguished those assignments. 28 U.S.C. §2517(b).[1]

The Government's contention that Bianchi proposes "that the Government should be ordered to pay the VECP award twice" (Brief in Opp., p. 6), is both misleading and erroneous. The United States Court of Appeals for the Federal Circuit has previously ruled upon the issue of the Government's liability. In *Bank of America v. United States v. Bianchi*, 23 F.3d 380 (Fed. Cir. 1994), the Court effectively held that the Government independently incurred

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28 U.S.C. §2517(b) provides:

> "Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and damages arising out of the matters involved in the case or controversy unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged."

liability to both Bianchi and the Bank in entering into an arm's length agreement with Bianchi with full knowledge of the facts, including the fact of Bianchi's assignment to the Bank. Clearly, the Government's obligation to both Bianchi and to the Bank was settled and was affirmed as res judicata by the United States Court of Appeals for the Ninth Circuit in *Bianchi v. Perry,* 140 F.3d 1294 (9th Cir. 1998).

However, the Government's contention that it is required to pay twice is, to a degree, correct. The Government is paying the Bank twice, first, upon the Judgment obtained by the Bank in the United States Court of Federal Claims (see, Appendices L, M, N, O and P) and, again, upon the summary judgment rendered in favor of the Bank, below. While the Federal Circuit clearly held the Government to be liable to both Bianchi and the Bank, the Government seems content to accept that double liability but wishes to pay its obligation to the Bank twice, while withholding the payment to Bianchi mandated by the Federal Circuit Decision in *Bank of America v. United States*, *supra*, and by the Ninth Circuit in *Bianchi v. Perry*, *supra*.

Therefore, the Government's contention that, "Petitioner identifies no source of law outside the settlement of an agreement that could plausibly be brought to compel that result," is simply erroneous. 28 U.S.C. §2517(b) holds that the Bank's right as assignee against the Government was completely discharged by the Judgment in the earlier case.

The Government's contention that the Ninth Circuit in *Perry* did not construe the VECP provision of the settlement agreement (Brief in Opp., p.8) is clearly erroneous. *See*, *Bianchi v. Perry*, 130 F.3d at 1297-1298. Moreover, this argument is now advanced for the third time. Not only has the argument been advanced here but the same argument was

advanced in *Perry* (the Federal Circuit reached only the issue of the monetary payment, not the issue of Bianchi's entitlement to his EAJA award) and to the Federal Circuit (the Federal Circuit resolved only the first of the Government's third-party claims against Bianchi; the Federal Circuit held that its rationale applied equally to both the first and second third-party claims). *See*, App. K, 170a.

Moreover, the authorities are clear and unequivocal such that the Government well knows that the Court of Federal Claims has no jurisdiction to entertain a mandamus action. *United States v. King*, 395 U.S. 1 (1969), *United States v. Testan,* 424 U.S. 392 (1976).

The importance and substantiality of the question presented has not been denied. Rather, the Government has attempted to re-frame the issue. Rather than addressing the issue on appeal, that is, whether the District Court has subject matter jurisdiction pursuant to 28 U.S.C. §1361 to mandate a Government officer to process the payment of an Award granted the Petitioner by the Armed Services Board of Contract Appeals, the Government re-states the issue to be whether or not the Government is obligated to pay the ASBCA award twice, an issue resolved conclusively by both the Federal and Ninth Circuits, and whether the contractor's suit to compel payment of the ASBCA award is based upon a contract, ignoring the fact that the contract claim was liquidated by an Award of a Court of competent jurisdiction and the instant case arose out of the equitable action in the nature of mandamus to compel payment of that award.

CONCLUSION

In light of the inability of the Government to face the issue presented in the Petition without distorting the issue on appeal and in light of the holding of the Ninth Circuit in the case from which the appeal has arisen, the need for plenary review of the action below is indisputable. Indeed, because the *Walker* Court requires Petitioner to re-litigate the contract claims already resolved in his favor and to seek mandamus in a Court without jurisdiction to entertain a mandamus action, Petitioner urges that the Petition be granted and that summary reversal is in order.

Respectfully submitted,

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APPENDIX L

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-3961C

[Filed: April 6, 1995]

THIS OPINION WILL NOT BE PUBLISHED

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant.	)

Michael L. Burack, Washington, D.C., for plaintiff.

Mark A. Melnick, United States Department of Justice, Washington, D.C., for defendant.

Robert A. Brunette, La Canada Flintridge, California, for third party defendant.

OPINION & ORDER

HODGES, Judge.

Bank of America seeks to recover money that defendant erroneously paid third party defendant contrary to Bank of America's assignment rights. This case is before the court on remand from the Federal Circuit.[1] The parties filed cross motions for summary judgment after that decision, and defendant seeks to reopen discovery. We deny defendant's motions and grant plaintiff's motion in part.

FACTS

In 1979 and 1980 the Defense Logistics Agency awarded three contracts to Bianchi to manufacture coats and jackets. Bianchi assigned the rights to the proceeds of the contracts to the Bank of America after award. The Bank notified the contracting officer and the disbursing officer in accordance with the Assignment of Claims Act. 31 U.S.C. § 3727 (1988), 41 U.S.C. § 15 (1988).

Later in 1980, the Bank sought to restructure its relationship with Bianchi, and received 90% loan guarantees from the small Business Administration to support its loans. Bianchi defaulted on his loans in 1981 and SBA paid the guaranteed amounts. In return for the SBA payments, the

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[1] See Bank of America National Trust and Savings Association v. United States v. Bianchi, 23 F.3d 380 (Fed. Cir. 1994).

Bank assigned its interest in the guaranteed loan agreement with Bianchi to SBA.

Bianchi's Defense Logistics Agency contracts were either completed or terminated by July 8, 1981. The events surrounding the contract terminations led Bianchi to institute a series of claims against DLA. In September 1988, Bianchi's claims against the Government were settled for $617,000 plus interest from June 18, 1981 until payment. The Armed Services Board of Contract Appeals issued a decision pursuant to the settlement and that decision was forwarded to the General Accounting Office (GAO) for payment.

Defendant paid Bianchi $1,141,220 in November 1988 despite the Bank's assignment rights. In June 1990, the Bank demanded the settlement amount erroneously paid to Bianchi. The Government requested repayment from Bianchi, but Bianchi refused.

Bank of America filed suit in this court seeking the settlement monies. We ruled that the Bank had no claim against defendant because it had assigned its rights to SBA in exchange for the 90% loan guarantee. SBA later paid Bank of America the 90% when Bianchi defaulted. The Court of Appeals for the Federal circuit held defendant liable to the Bank for the settlement paid to Bianchi by mistake. Bank of America, 23 F.3d at 385.

The Bank loaned money to Bianchi for contact performance before his contacts were terminated. After termination, it financed Bianchi's prosecution of his claims against the Government. Bianchi's indebtedness tot he Bank related to performance loans as of November 1994 totals

$1,094,421, including interest.

DISCUSSION

Summary judgment is appropriate in this matter. Defendant has had ample opportunity for discovery but has not shown that material facts are in dispute. It is clear that defendant is liable to the Bank for money it erroneously paid to Bianchi. See Bank of America, 23 F.3d at 385. Facts and issues in California state court proceedings between the Bank and Bianchi do not affect this case. The sole issue is the amount of the Bank's damages.

The Bank has produced affidavits which set forth the amount of money loaned to Bianchi during contract performance. The amounts loaned remained unpaid through November 1988 when defendant erroneously paid Bianchi pursuant to the parties' settlement and ASBCA decision.

The intent of the Assignment of Claims Act is to facilitate performance of government contracts by making contractors' assignments independent of other financial agreements. Central Bank v. United States, 345 U.S. 639 (1953). Bianchi's debt to Bank of America exceeds the $1,141,220 settlement improperly paid to Bianchi by the Government. However, the Bank's rights to the assigned proceeds are limited under the Assignment of Claims Act. 31 U.S.C. § 3727, 41 U.S.C. § 15. Loans used for purposes other than contract performances are not protected by Act. Coleman v. Untied States, 158 Ct. Cl. 490, 496 (1962). The Act specifically prohibits assignments that do not comply with its provisions. American Nat. Bank & Trust Co. Of Chicago

v. United States, 22 Cl. Ct. 7, 16 (1990).

An assignment is defeated if the lender has reason to know that the loan proceeds will not be used in completion of the government contract. First National City Bank v. United States, 212 Ct. Cl. 357 (1977). To prove the existence of a valid statutory assignment, a bank must show that it loaned money or made money available for contract performance. If Bank of America did not loan money for performance of the contract, the assignment is not valid. American Nat. Bank, 22 Cl. Ct. At 16 (citations omitted). The Bank can recover only the contract-related loans it made to Bianchi. When the Government erroneously pays the contractor instead of the assignee, the assignee may recover only that amount which was disbursed to the contractor-assignor in contravention of the valid assignment. See Maryland Small Business Fin. Auth. v. United States, 4 Cl. Ct. 76, 80 (1983).

Bank of America loaned money to Bianchi before his government contracts had ended. These loans satisfied the statutory requirements for a valid assignment, and the Bank may recover these amounts. When the Bank loaned money to Bianchi after the contract period was completed, it knew that such loans were not available for use in contract performance. That money was used to prosecute Bianchi's legal claims against the Government. Such assignments did not comply with the Act, and the Bank cannot recover those amounts from defendant.

Because the validity of the Bank's assignments was limited, it was not entitled to recover the full amount of the $1.14 million contract proceeds settlement from DLA in 1988. The Bank may collect from that settlement only the

amount that it can trace to loans made before contact termination.

Bank of America seeks recovery of accrued interest, but it cited no contract or statutory provision permitting it to collect interest. Interest on a claim against the United States is permissible only pursuant to a contract or an Act of Congress expressly providing for such payments. 28 U.S.C. § 2516(a); First National City Bank, 212 Ct. Cl. At 371. The United States is immune from an interest award in absence of express congressional intent. Library of Congress v. Shaw, 478 U.S. 310, 314 (1986). To recover interest on an implied or express contract, the Bank must prove that the Government agreed to assume liability for accrued interest. See Maryland Small Business Fin. Auth., 4 Cl. Ct. At 80. The Bank has provided no evidence of such assumption of liability by defendant. Bank of America is not entitled to the full $1.09 million that it estimates had accrued as of November 1994 because this figure includes more than six years' interest.

CONCLUSION

The Bank will provide evidence of the amount of the amount owed on qualified loans as of November 1988 and the legal basis for its claim of interest no later than April 17. Defendant's response will be due on or before April 28.

Plaintiff's motion for summary judgment is GRANTED-IN-PART. Defendant's cross motion for summary judgment is DENIED. Defendant's motion to reopen discovery is DENIED.

/s/_____
Robert H. Hodges, Jr., Judge

APPENDIX M

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-3961C

[Filed: July 28, 1995]

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant.	)

JUDGMENT

Pursuant to the court's order of July 26, 1995,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $342,140.05. The third party

complaint against Bianchi is dismissed. No costs.

David A. Lampen
Clerk of Court

By: /s/_____
Deputy Clerk

July 28, 1995

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

APPENDIX N

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-3961C

[Filed: August 7, 1995]

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant.	)

(Judge Hodges)

UNNOPOSED MOTION OF BANK OF AMERICA FOR RECONSIDERATION

Pursuant to FUSCC 83.2(f), Bank of America hereby moves the court to reconsider Part II of its order of July 26, 1995 awarding $342,140.05 to Bank of America and, upon reconsideration, to enter an order awarding the Bank the sum of $717,009.94. We are authorized to represent that the Government does not oppose this motion.

The grounds for the motion are as follows:

1. The award of $342,140.05 represents a position that no party to the case advanced, either in writing or orally, and that the Court adopted sua sponte without allowing it to be subjected to the test of briefing or argument. The award disallows any recovery by the Bank on account of interest that has accrued on the "qualified loans" (as that term has been used in this case) made by the Bank to Bianchi. By contrast, the Government's position was that the Bank is entitled to recover from it on account of such interest accruing through (but not beyond) the date of the Government's erroneous payment to Bianchi. Accordingly, the Government agreed to the entry of an order awarding the Bank $717,009.94.[1] By this motion for reconsideration, the Bank seeks the entry of such an order.[2]

2. In its decision, the Court stated, correctly, that the government's obligations to the Bank in this case "arise solely

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[1] Defendant's Supplemental Submission in Response to the Court's Inquiry During the May 30 Hearing, dated June 2, 1995.

[2] By moving for reconsideration on this ground, the Bank reserves, and does not waive, the right to appeal the Court's judgment on other grounds as well if this motion is denied.

from the Assignment of Claims Act." This fact is entirely consistent with, and supports, the Bank's entitlement to recover from the Government on account of interest accrued under Bianchi's qualified loans. By their terms, Bianchi's assignments to the Bank covered all moneys due under Bianchi's contracts. The assignments were security for Bianchi's payment of his indebtedness to the Bank. That indebtedness includes not only the principal that the Bank lent to Bianchi, but also interest that has accrued on that principal. Nothing in the Act, or in any of the cases cited by the Court, precludes an assignee from recovering moneys subject to an assignment on the ground that the moneys are for repayment of the accrued interest portion of the secured indebtedness. Yet that is what this Court has held.

3. The analysis of the cases in Part II of the Court's order is incorrect. Both Chelsea Factors and Continental Bank expressly state that an assignee may recover from the Government on account of interest accrued under loans subject to an assignment, as well as on account of the principal. 181 F. Supp. At 693; 416 F.2d at 1302. The Court's order acknowledges that the such interest is recoverable by the assignee where the Government has not made an erroneous payment. The Court holds, however, that such interest is not recoverable were the Government has made an erroneous payment, and the Court distinguishes Chelsea Factors and Continental Bank on the ground that there the Government had not made erroneous payments, whereas here it had. But the line the Court has drawn is contrary to the settled legal principle -- emphasized by the Federal Circuit's earlier opinion in this very case -- that a prior erroneous payment by the Government is no bar to the assignee's right to be paid. 23 F.3d at 384-85. As for

Central National Bank of Richmond, it is not a precedent for, and provides no support for, the Court's decision here.[3] The opinion in that case does not mention accrued interest. Nothing in the opinion indicates that the plaintiff sought to recover on account of accrued interest, and there is nothing in the opinion -- no discussion, analysis, citation or reference -- to suggest, that the court considered the question.

4. The rule that interest on claims against the United States may not be awarded in the absence of statutory authorization does not defeat the Bank's entitlement. The issue before the Court does not involve interest on a claim against the United States. It invoives interest that has accrued on the Bank's claim against Bianchi pursuant to the terms of Bianchi's notes. See Continental Bank, 416 F.2d at 1302 (distinguishing between interest accruing under the loan documents and statutory interest against the Government on the amount of the recovery).

5. Granting this motion for reconsideration would put an end to this lengthy litigation. If the Court grants this motion, the Bank will seek no further appeal with respect to the remainder of the $1.14 million settlement payment.

CONCLUSION

For the foregoing reasons, the Court should reconsider Part II of its order awarding $342,140.05 to Bank of America

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[3] To the contrary, Central National Bank emphasizes that "where an erroneous payment is made by the Government it is no bar to the rightful claimant." 91 F. Supp. At 741.

and, upon reconsideration, should enter an order awarding the Bank the sum of $717,009.94.

Respectfully submitted,

/s/_____
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Dated: August 7, 1995

APPENDIX O

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-3961C

[Filed: August 14, 1995]

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant.	)

ORDER

The amount of recovery indicated in the July 26 order was in error. The Clerk will enter a corrected judgment in the amount of $717,009.94. No costs.

/s/_____
John P. Wiese, Judge, for
Robert H. Hodges, Jr., Judge

APPENDIX P

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 90-3961C

[Filed: August 22, 1995]

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA, Defendant and Third-Party Plaintiff,	)
v.	)
MAURICE L. BIANCHI, Third Party Defendant.	)

CORRECTED JUDGMENT

Pursuant to the court's order of August 14, 1995,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $717,009.94. The third party

complaint against Bianchi is dismissed. No costs.

David A. Lampen
Clerk of Court

By: /s/_____
Deputy Clerk

August 22, 1995

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing fee is $105.00.